

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3736 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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VANIA SILK MILLS LTD.

Versus

SILK MILL WORKERS UNION  
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Appearance:

MR MR BHATT for Petitioners now represented by  
Official Liquidator.

MR PB MAJMUDAR for Respondent No. 1, 2  
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CORAM : MR.JUSTICE R.BALIA.

Date of decision: 12/12/96

ORAL JUDGEMENT

1. Since the filing of the petition winding up proceedings of the petitioner company have taken place and official liquidator has been appointed. At the request of learned counsel Mr. M.R. Bhatt in the presence of Official Liquidator, the oral request of substituting the name of Official Liquidator as representing the petitioner company is allowed.

Necessary amendment shall be carried out by the learned counsel by the end of the day.

2. The petitioner challenges the order dated 3.6.1985 made by the Civil Court, Gandevi, as authority under Payment of Wages Act directing the petitioner company that -

"In the interest of natural justice I appoint Shri K.B.Naik, Clerk of the Court of this Court and Shri V.L. Panwala, Advocate as Commissioners. If the defendant Mill does not furnish the necessary security, then the Commissioners to take the possession of the Mill, attach the Machinery and other material - moveable or immovable and to sell the same by proclamation and the amount of sale be credited into Court and keep the account and submit the report."

3. At the time of hearing, both the learned counsel state that since the filing of the petition, petitioner company has been ordered to be wound up. The effect of winding-up has been stated in Section 446 of the Companies Act. It reads as under:

"446. Suits stayed on winding up order.

(1) When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of winding up order, shall be proceeded with, against the company, except by leave of the Court and subject to such terms as the Court may impose.

(2) The Court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of -

(a) any suit or proceeding by or against the company;

(b) any claim made by or against the company (including claims by or against any of its branches in India);

(c) any application made under Section 391 by or in respect of

the company;

- (d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company;

whether such suit or proceeding has been instituted or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.

- (3) Any suit or proceeding by or against the company which is pending in any court other than that in which the winding up of the company is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that Court.

- (4) Nothing in sub-section (1) or sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court."

From the aforesaid, it is clear that legal proceedings pending against the company on the date of appointment of Official Liquidator whether on making an order of winding up or the order appointing the provisional liquidator can not be proceeded with against the company, except by the leave of the Court. It also envisages that court which is winding up the company shall have jurisdiction to entertain or dispose of any suit or proceedings by or against the company any claim made by or against the company, any application made under Section 391 by or in respect of the company and any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company. Whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960. So far as the question of proceeding with the leave of the company court or transfer of pending proceedings to the company court, which is seized with

the matter of winding up does not apply to the proceedings pending in appeal before the Supreme Court or a High Court. Obviously, this provision cannot affect the petition under Article 226 of the Constitution of India, which is a constitutional remedy and cannot be overridden by any legislative enactment. The provision otherwise also makes it clear that regarding pending proceedings before appropriate authorities, they are ipso facto come to be disposed of by the court seized with the matter of winding up, except those who are covered by subsection (2) and except any suit or legal proceedings pending against companies under subsection (1), it depends upon the grant of leave by the court and its continuance depending upon by the grant of leave by the Court. However, this question should not detain us any more inasmuch as, as noticed above, this being a petition under Article 226 and 227 is not affected by provision under Section 446.

4. Having perused the order under challenge, I am of the opinion, that on the face of it, the order is not sustainable. The order purports to have been made in exercise of power under Section 17A of the Payment of Wages Act, 1956, which reads as under:

"17-A. Conditional attachment of property of employer or other person responsible for payment of wages. - (1) Where at any time after an application has been made under sub-section (2) of Section 15 the authority, or where at any time after an appeal has been filed under Section 17 by an employed person or any legal practitioners or any official of a registered trade union authorised in writing to act on his behalf or any Inspector under this Act or any other person permitted by the authority to make an application under subsection 92) of Sect. 15 the Court referred to in that section, is satisfied that the employer or other person responsible for the payment of wages under Section 3 is likely to evade payment of any amount that may be directed to be paid under Section 14 or Sec.17, the authority or the Court, as the case may be, except in cases where the authority or Court is of opinion that the ends of justice would be defeated by the delay, after giving the employer or other person an opportunity of being heard, may direct the attachment of so much of wages as is, in the opinion of the authority or Court, sufficient to satisfy the amount which may be payable under the direction.

(2) The provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to attachment before judgement under that Code shall, so far as may be, apply to any order for attachment under sub-section (1)."

The perusal of the aforesaid provision, makes it clear that the conditions necessary for invoking the power under Section 17A for attachment of the employer's property are (1) that an application under sub-section (2) of Section 15 must have been made by the workman; (2) or an appeal against the order under Section 52 has been filed by any workman; (3) the court is satisfied that employer or other person responsible for payment of wages is likely to evade payment of any amount that may be directed to pay under Section 15 or Section 17 and that it also accepts and is of the opinion that justice would be defeated by delay and an opportunity of hearing in this regard is given to the employer, then, the authority can direct attachment of only so much of the property of the employer or other person responsible for the payment of wages as is, in the opinion of the authority or court, sufficient to satisfy the amount which may be payable under the direction.

5. From the perusal of the order we find the order does not disclose whether any application under Section 15(2) or appeal under Section 17 at the instance of workman has been filed. It also does not record the satisfaction of the court about the fact that employer is likely to evade payment of any amount that may be directed to be paid under Section 15. No reference has been made as to what is the amount of wages which is likely to be directed to be paid by the employer to the workman in respect of which power under Section 17A could be exercised; nor any satisfaction about expected avoidance or delay on the part of employer in payment of the sum which is likely to be directed to be paid as a result of direction under Section 15 or 17 finds place in the order. It only tells about an order made in criminal case No. 1882 of 1984 pending before the same authority as the court having jurisdiction under Criminal Procedure Code and undertaking given in that case by the employer. Without reference to the necessary requirement of the conditions of Section 17A, namely, determination of expected sum which may be directed to be paid by the employer to the workman under Section 15 and satisfaction about non compliance or delay or avoidance by the employer after such a direction has been made, no order

under Section 17-A could have been made. The strangest part of the order is that it directs the attachment of the property in case the defendant mill does not furnish the necessary security but it does not anywhere states about the direction to furnish security or to satisfy what is meant by necessary security, as if the determination of the sum payable has been left to the employer for furnishing security by implication. Not only this, in the same breath in which it directs the Commissioner to take the possession of the mill and attach the machinery movable or immovable he also directs the selling of the property and the amount of sale to be credited to the court. Power under Section 17A has been conferred only to the extent of attaching the property and keep it at that stage until final determination of the amount payable by the authority concerned. The property of a defendant in a suit attached before judgement can be sold only when the claim in the suit becomes a decretal debt and the defendant becomes judgment debtor. The sale of the property before that unless it is a decaying property is not permissible, nor authorised by law. It appears that learned authority under Payment of Wages Act has acted more on whims than within the precincts of law. It appears that his attention was not at all drawn to the provisions under which he was asked to exercise the power, else the impugned order in the form in which it is would not have come into existence. The order on the face of it is not sustainable in the light of provisions of Section 17A and deserves to be quashed.

Accordingly this petition succeeds. The impugned order dated 3.6.85 Exh.B is quashed. Rule made absolute, There shall be no order as to costs. However it is made clear that this will not affect the rights of the workman to make necessary claim before the Official Liquidator.